No. 85-728

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In the Supreme Court of the United States

OCTOBER TERM, 1985

C.L. CARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the prosecutor's designation of an FBI agent as an "agent" of the grand jury is an error that requires dismissal of the indictment and reversal of his convictions even in the absence of any prejudice.

1. Following a jury trial in the United States District Court for the Western District of Arkansas, petitioner was convicted on two counts of aiding and abetting the willful misapplication of bank funds, in violation of 18 U.S.C. 656 and 2. He was sentenced to three months' imprisonment, fined $1,000, and placed on two years' probation (Pet. App. A17-A19). The court of appeals affirmed (*id.* at A1-A16).

The evidence at trial is outlined in the opinion of the court of appeals (Pet. App. A3-A4). In brief, petitioner, an automobile dealer and real estate investor, engaged in a scheme to deprive the First National Bank of Harrison, Arkansas

(the Bank), of its proper collateral on auto loans that subsequently went into default and to arrange fictitious sales of real property on which the Bank made loans that were in fact given to petitioner. Joel Tabor, an officer of the Bank, was involved in the scheme and received kickbacks for approving some of these transactions.

2. Tabor was indicted and convicted of embezzlement. Thereafter, he testified under a grant of immunity before a federal grand jury (the 1983 grand jury). After Tabor's initial appearance, the prosecutor made the following statement (Pet. App. A4, A5 (brackets in original)):

> Let me explain to you in front of the grand jury, . . . obviously we cannot cover in sufficient detail on these loans to enable us to do a proper investigation. I'm going to ask the grand jury to appoint Gary Aaron, a special agent of the FBI, as an agent of the grand jury, to continue . . . questioning you [Tabor] from time to time, as an agent of the grand jury and to report back . . . . [T]his information that you supply through Mr. Aaron will be included in the grant of immunity that has already been afforded to you.

The 1983 grand jury took no further action and its term expired before the investigation was completed (*ibid.*).

A new grand jury was empanelled in February 1984 (the 1984 grand jury). Evidence before the 1983 grand jury, including Tabor's testimony, was read to the 1984 grand jury. In addition, FBI Agent Gary Aaron testified before the new grand jury concerning his interviews with Tabor; Aaron appeared as a witness and was neither designated nor sworn as an agent of the grand jury. The 1984 grand jury subsequently indicted petitioner on the charges for which he was convicted at trial. Pet. App. A5-A6, A9-A10.

3. Petitioner contends that the prosecutor's designation of FBI Agent Aaron as an "agent" of the 1983 grand jury was error and requires the automatic dismissal of the indictment and reversal of his convictions even in the absence of any actual prejudice. For the reasons stated in our brief in opposition in *Jones* v. *United States*, cert. denied, No. 85-398 (Dec. 2, 1985), in which the same question was presented, petitioner's argument is without merit and does not warrant further review. See also *Griffith* v. *United States*, cert. denied, No. 84-6876 (Oct. 7, 1985); *United States* v. *Anderson*, No. 83-2519 (10th Cir. Dec. 6, 1985), slip op. 8 ("Fed. R. Crim. P. 6 contemplates the use of government agents * * * to assist an attorney for the government in his handling of a grand jury investigation"), rev'g 577 F. Supp. 223 (D. Wyo. 1983).[1] The Court denied certiorari in *Jones*, and there is no reason for a different result here.[2]

Petitioner does not claim that he suffered actual prejudice as a result of the error he asserts. On the contrary, as both the district court and the court of appeals found (see Pet. App. A8), it is clear that there was no prejudice in this case. In fact, the designation of FBI Agent Aaron as an "agent" of the grand jury occurred not before the 1984 grand jury that indicted petitioner but before the predecessor 1983 grand jury. And petitioner does not dispute that under *Costello* v. *United States*, 350 U.S. 359 (1956),

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[1]We are sending copies of our briefs in opposition in *Jones* and *Griffith* to counsel for petitioner.

[2]Indeed, because petitioner did not raise his challenge to the grand jury prior to trial (see Pet. 5), we believe that it was waived. See Fed. R. Crim. P. 12(b)(2) and (f).

Aaron could properly present hearsay evidence to the grand jury of Tabor's statements to him concerning petitioner's role in the embezzlement scheme.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1986

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[3]As in *Jones* and *Griffith*, it is unnecessary for the Court to hold this petition pending its decision in *United States* v. *Mechanik*, cert. granted, No. 84-1640 (argued Dec. 2, 1985). *Mechanik* presents the question whether a violation of Fed. R. Crim. P. 6(d) may be grounds for dismissal of an indictment in the absence of prejudice. The court of appeals in that case relied heavily on the language and purpose of Rule 6(d), which limits who may be present before the grand jury, in fashioning its rule of per se dismissal (see 735 F.2d 136, 139 (4th Cir. 1984)). Whatever the merits of the court's reasoning with respect to Rule 6(d), it has no application here, where there has been no violation of that Rule. As the cases cited in our brief in opposition in *Jones* make clear, the general principle is that prejudice must be shown to warrant dismissal of the indictment. *Mechanik* presents the question whether violations of Rule 6(d) should be treated as an exception to that principle.